Supreme Court, U.S.
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No. 97-1917

In The
Supreme Court for the United States

October Term, 1997

BRUCE BUCHBINDER, et ux.,
Petitioner,

vs.

FRANCHISE TAX BOARD, et al.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

BRUCE BUCHBINDER
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15 pp

QUESTIONS PRESENTED

1. Should the Court grant certiorari in a case where statements of fact and law go uncontested pursuant to waiver by respondent, wherein respondent had an obligation to point out perceived misstatements made in petitioner's petition (Supreme Court Rule 15.2), and by not responding renders rebuttal moot, pre-empting any further litigation, in that any objection to consideration of a question presented based on what occurred in the proceedings below may be deemed waived unless called to the Court's attention in the brief in opposition; thus leaving respondent in the precarious position of accepting the risk that any objection he may later make may be deemed waived, clearly indicating to the Court his acquiescence to petitioner's version of the law and facts?

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CONSTITUTION, STATUTES, AND CODES:

Article III of the United States Constitution 2
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Amendment I of the United States Constitution 2
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COURT RULES:

Supreme Court Rule 15.2 5
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PRELIMINARY STATEMENT

Petitioner Bruce and Elaine Buchbinder come before this Court stating there exists an intervening circumstance of a controlling effect, not previously presented to this Court. The intervening circumstance is set forth within the body of the Brief herein.

STATEMENT OF THE CASE

On May 27, 1998, Petitioner Bruce Buchbinder and Elaine Buchbinder filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, seeking the issuance of a supervisory opinion in review of the actions of the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Northern District of California. The relief sought resulted from the subsequent dismissal of the Buchbinders' case by the Ninth Circuit and District Court which effectively and subsequently denied Petitioners' constitutionally protected right to full and meaningful review and substantive due process.

Petitioner presented a case against respondent, complaining that the Ninth Circuit Court of Appeals gravely erred by affirming the lower court's order dismissing the action over the issue of substantibility, whereas the issues raised by petitioner were substantial issues, thus the Ninth Circuit's action leading to an issue of violation of petitioners' Right to due process; petitioner further complaining that the District Court erred by granting respondent's motion to dismiss on the pretense that the Tax Injunction Act applied to petitioner's persona when in fact the court was without evidence of a judicial determination that

there was a tax liability in the first place. Petitioner stated in its petition for Writ of Certiorari filed on May 27, 1998, on page 19 that the District Court failed to discern the distinction between the jurisdictional issues petitioner raised for adjudication and issues of constitutionality perceived by the court. Petitioner further stated on page 17 that the case was a proper case for federal court jurisdiction because the United States Constitution is the Supreme Law of the Land and the ultimate arbitrator on issues of Due Process; in that statutes involving federal income tax are the controlling law and state law is subordinate, as the state follows federal judiciary outcome in matters pertaining to direct taxation of income, as in the instant case.

Petitioner further stated on pages 23 and 24 that since petitioner raised a Federal Question of due process right violations pursuant Article III, Amendment I and Amendment V of the Constitution for the United States of America, and invoked federal jurisdiction to protect its secured Constitutional Right, thereby exercising its secured Right; and especially in light of the controversial waiver issue in petitioners' related federal case, and in that the state was a party in interest to the outcome of the controversy, and in that the Tax Injunction Act and Eleventh Amendment did not apply to petitioners' persona, and in that the judge confused the issues by characterizing jurisdictional issues as constitutional tax issues, the action of the lower courts in the instant case clearly constituted a denial of petitioners' Right to proper due process secured by the Constitution for the United States of America and Right to meaningful access to the Courts.

On June 22, 1998, during pendency of petitioners' Petition for a Writ of Certiorari to this Court, the Supervising Deputy Attorney General of the State of California, Paul D. Gifford, who makes appearance and is counsel for Respondent, admitted to practice before this Court, appeared by brief and filed an

express written waiver of right to file in opposition to Petitioners' asserted facts and conclusions. A copy of the waiver appears in Appendix A.

RESPONSE TO WAIVER

In its Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Petitioner raised the question of whether the United States Court of Appeals for the Ninth Circuit properly affirmed the United States District Court's order dismissing the action for lack of jurisdiction where:

> (a). the United States District Court failed to discern the distinction between the jurisdictional issues petitioner raised for adjudication and issues of constitutionality as perceived by the court relative to state direct taxation of income, and where the Tax Injunction Act that barred petitioners' claims before the court did not apply to petitioners' persona, the court being without evidence of a judicial determination that petitioner was a taxpayer or that there was a tax liability in the instant matter; and,
>
> (b) the United States Court of Appeals gravely erred by affirming the lower court's order dismissing the action over the issue of substantibility, in that the state was a party in interest to the outcome of the controversy, and in that the outcome of petitioners' case in a federal related matter attached to the instant case, these issues being substantial issues leading to an issue of violation of petitioners'

> Right to due process secured by the Constitution for the United States of America, and whether the arbitrary dismissal of petitioners' cause of action before the United States District Court and the Ninth Circuit Court of Appeals constituted a denial of proper due process and right to meaningful access to the courts, in light of the circumstances as a whole in the instant case.

These questions remain unanswered in respect to the Petitioner.

Petitioner further raised the question of whether it had been deprived of its Due Process right, deprived of its Right to Redress of Grievances, and deprived of its Right to meaningful access to the courts; petitioner having raised the question of whether the Tax Injunction Act and Eleventh Amendment, relied upon by respondent to support his motion to dismiss, applied to petitioner's persona, and whether petitioner was justified in invoking its due process Right under the Constitution for the United States of America and raising a Federal Question of due process right violation in response to state authorities violating that right, especially in that the state was a party in interest to the outcome of the controversy in the instant matter; and whether federal jurisdiction was proper for the instant case where issues of law and fact in a related federal judiciary proceeding were controlling; and finally whether the waiver issue in that related federal case attached to the instant case, giving the federal judiciary jurisdiction in the instant matter, in that the government's failure to object in a timely fashion to petitioner's claim of default in that federal related case thereby established the default, and whether the instant case was controlled by the default, and whether federal jurisdiction was thus proper for a case raising the waiver issue, having its nexus in federal judiciary proceedings, properly denominating such a

case for federal subject matter jurisdiction, such as in the instant case; and lastly whether the federal judiciary had original jurisdiction pursuant Article III, Section 2, Clause 1, in such cases as the instant case, in that the state follows federal judiciary outcome in matters of direct taxation of income.

The Respondent expressly waived its right to respond in the instant case pursuant to Supreme Court Rule 15.5. Such a waiver, in the face of Petitioners' asserted facts and conclusions, serves to leave the Petitioners' allegations uncontested before the Court.

The Respondent offered no defense against the assertions made by Petitioner, and did not point out any perceived misstatements of law or fact *having an obligation* to do so pursuant to Supreme Court Rule 15.2. The Respondent specifically chose to waive that right pursuant to 15.5. Such a response leaves the respondent in a precarious position, as any objection he may later make, should the Court grant certiorari, may be deemed waived in that he did not call such objection to the Court's attention in a brief in opposition; respondent thereby jeopardizing his capability to later object, clearly indicating to the Court his acquiescence to petitioner's version of the law and facts.

Respondent did not correct the record as to what issues were proper to bring before the Court, and specifically did not question the basis for the petition, nor question the grounds upon which petitioner raised its petition, nor did the respondent bring to the Court's attention that petitioner raised no valid Due Process issue, nor did Respondent bring to the Court's attention that Petitioner was making assertions which had no valid basis in the record. In short, respondent made no attempt to protect the basis he had established in the lower courts, as he had in other United States Supreme Court cases such as in *Woosley v.*

California, (1993) 124 L.Ed. 2d 639, 113 S. Ct. 2416 .

Instead of correcting the record, respondent waived his right to file a Brief in Opposition, rendering rebuttal moot on these issues, and by acquiescence defaulted thereby. Petitioner's statements and assertions unrebutted therefore, stand as truth, rendering respondent's rebuttal before the Court moot in the instant case. Under the Common Law Rule of Reasonable Argument, Petitioner therefore claims a default judgment against Respondent in the instant case, *U.S.* v. *Schneiderman*, (1951) 102 Fed. Supp. 87 and *States S.S. Company v. Permanente S.S. Corp.*, (1956) 231 F.2d. 82.

CONCLUSION

Now therefore, since Respondent has opted to waiver with full knowledge that the Court may deem his later objection waived, respondent has by his actions, rendered rebuttal moot and pre-empted further litigation, allowing petitioner's version of the law and facts to stand unrebutted, thereby conceding that petitioner did not receive proper Due Process of Law nor Redress of Grievance, nor meaningful access to the courts as complained of by petitioner in the instant case.

Therefore, in consideration of the injury caused to petitioner by respondent in the instant case, in the deprivation of its due process right and right to meaningful access to the courts, petitioner is deserving of an award of claimed damages, and hereby claims damages, punitive damages and court costs from the Respondent in the amount of $125,000.00 due petitioner;

respondent having caused petitioner undue disruption in Life, Liberty, and the Pursuit of Happiness.

Respectfully submitted,

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DATED: July 17, 1998

APPENDIX A

WAIVER

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 97-1917

BRUCE BUCHBINDER (Petitioner) v. FRANCHISE TAX BOARD (Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

X Please enter my appearance as Counsel of Record for all respondents.

There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

_____

_____

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed since your admission):

Signature /s/ Paul D. Gifford

Date: 6-22-98

(Type or print) Name PAUL GIFFORD

X Mr. Ms. Mrs. Miss

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A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

SEE REVERSE FOR INFORMATION CONCERNING THE STATUS OF A CASE ON THE DOCKET.

CC:

CLER-0080-11-97

DECLARATION OF SERVICE MAIL

Case Name: Bruce Buchbinder, et ux. v. FTB, et al.
Case No. : Supreme Court Case No. 97-1917

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On June 22, 1998, I placed the attached

WAIVER

in the internal mail collection system at the Office of the Attorney General , 2101 Webster Street, 12th Floor, Oakland, California 94612, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage fully prepaid, addressed as follows:

Bruce Buchbinder
Elaine Buchbinder
1178 Via Ferrari Drive
San Jose, CA 95122
(Counsel for Petitioner - In Pro Se)

I declare under penalty of perjury the foregoing is true and

correct and that this declaration was executed on June 22, 1998, at Oakland, California.

Lydia Banaga /s/ Lydia Banaga
Signature